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In The

Supreme Court of the United States

October Term, 1971

71-71

JACK MATALON,

Petitioner,

- against -

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Jack Matalon petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 16, 1971 (Docket No. 71/1067).

The judgment affirmed the conviction for fraud, and conspiracy to defraud, after a jury trial in the Southern District of New York (66 CR 200).

Opinion Below

The opinion of the Court of Appeals, not yet reported, is set forth in the appendix.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is granted pursuant to 28 U.S.C. 1254(1).

Constitutional Provision Involved

The Sixth Amendment to the United States Constitution, and its right to counsel, is well known to this Court.

Issues Involved

Did the Court of Appeals err, contrary to the Sixth Amendment right to effective counsel, in holding that the petitioner was not denied a fair trial by his own counsel, when counsel, unaware of Michelson (335 U.S. 469) called seven reputation witnesses, each of whom was asked about petitioner's numerous indictments, arrests, convictions and court martial?

Did the Court of Appeals err, contrary to the Sixth Amendment right to effective counsel, in holding that the petitioner was not denied a fair trial by his own counsel, when counsel, without advising petitioner of his privilege against self-incrimination, questioned him about the factual basis of two other pending indictments?

Should this Court re-assess the holding of United States v. Michelson, 335 U.S. 469, and place some limitation upon the questioning of reputation witnesses as to events of remote in time and significance? Should the district courts be vested with discretionary power to exclude questions as to remote events?

Did the District Court err in this case in not excluding questions as to an arrest twenty-five years ago; a conviction twenty-three years ago; and a court martial twenty-four years ago?

Preliminary Statement

Petitioner Jack Matalon was convicted of inducing Norman Allan to travel from Detroit to New York City in furtherance of a scheme to defraud (18 U.S.C. 2314), and of conspiracy to defraud (18 U.S.C. 371).

At the trial, petitioner was represented by privately retained counsel. He called seven reputation witnesses to testify on behalf of Matalon. Obviously defense counsel was not aware of the holding of United States v. Michaelson, 335 U.S. 469 (1948), which permits the prosecution to inquire as to whether each witness, in learning of the defendant's reputation, had heard of prior arrests, indictments, convictions and court martial. As to each of the seven witnesses, the United States' Attorney asked the following series of questions:

> "Q. And these people who you talked to about Mr. Matalon's reputation, from the discussions you had, whatever they may be, have you heard that Mr. Matalon was arrested in 1967 and is presently under indictment in this Court for possession of goods stolen from interstate commerce?
> A. I did not.
> Q. From these people that you discussed Mr. Matalon's reputation with, have you heard that Mr. Matalon was arrested and convicted in 1947 for auto theft joy riding?
> A. No, sir.
> Q. From these people who you discussed Mr. Matalon's reputation with, have you

heard that Mr. Matalon was arrested in 1945 for grand larceny?
A. I did not.

Q. From these people that you have discussed Mr. Matalon's reputation with, have you heard that while Mr. Matalon was in the service he was convicted by a summary court martial for engaging in black market activities and was sentenced to be restricted for 30 days, reduced to the rank of private and forfeited $50 from his pay?
A. I did not."

Then the defense counsel called his client to the witness stand, and asked him to explain and give full details as to each of the prior convictions, court martial and arrests, and also as to the factual basis of the two pending indictments.

"Q. Were you charged in the indictment and are you still charged in that indictment for smuggling?
A. I am so charged, sir.

Q. Would you tell us the facts and circumstances surrounding this indictment? You haven't been convicted have you?
A. No, sir.

Q. Is it an open indictment since 1967, tell us about it?
A. Yes, sir [69a-70a].

* * * *

Q. Let's take this great big charge here, possession of stolen goods from interstate commerce in 1967. You heard the District Attorney ask the character witnesses if they had heard about it, did you not?
A. Yes, I did, sir.
Q. Tell this good jury about this indictment of 1967. By the way, it is still open, is it not?
A. That is correct sir.
Q. Tell us about this indictment of 1967, possession of stolen goods?" (75a-76a)

Of course, as defense counsel had opened the door, the United States Attorney was permitted to cross-examine Matalon as to the factual basis of these two pending indictments (86a-92a).

In fact, defense counsel went out of his way to question Matalon as to still another indictment, which the government had recently nollied (85a).

"Q. Sir, with reference to that pearl transaction with Mr. Norman Allan, were you indicted by the government?
A. Yes, I was.
Q. Were you informed sir that that indictment was withdrawn?
A. Yes, I was, sir."

When defense counsel began to question Matalon with respect to the pending indictments, the trial judge became concerned, and directed defense counsel to advise Matalon of his right prior to his answering these questions: "If you have not

apprised him of his rights before this time, take him off the stand and apprise him of his rights."

Later the District Judge asked defense counsel if he had so advised Matalon with respect to his constitutional rights in this area. Finally, defense counsel conceded:

> "No, I did not tell him at that point. I did not tell him that he had the right — all I can say at that point I did not tell him."

In summation the prosecutor seized upon the opportunity to comment upon the reputation witnesses.

> "Not only did Mr. Matalon commit a fraud or participate in the scheme of a fraud with Mr. Allan, and not only did he try to commit a fraud by making you believe his testimony, he commits a fraud in his community... by calling his witnesses in to testify to his good reputation by not telling them any of them, about his indictments and his court-martial.
>
> What was Mr. Matalon's testimony under direct examination? He said he was innocent of this indictment. He is innocent of the other indictments, and finally he is innocent — he tries to explain to the court-martial in the Army and finally upon cross-examination, about the fourth time round when I ask him, he admits he is guilty of the courtmartial charge.
>
> Under direct examination he said he was

innocent of the watch indictment; that there were two watches involved."

In brushing aside the claim of ineffective assistance of counsel, the Court of Appeals wrote:

> "Appellant's only ground that concerns us on this appeal is his claim that he was denied the effective assistance of counsel at trial. This serious, but not uncommon allegation, is premised on trial counsel's calling of seven reputation witnesses, all of whom were impeached on cross-examination with evidence of defendant's prior criminal history. It is clear that the prosecution would have been unable to introduce this evidence if the reputation witnesses had not been called. See Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213 (1948). In effect, the defendant claims that his conviction resulted from this blunder of defense counsel, compounded by his calling the defendant to the stand; that these errors enabled the jury to convict him, not on the evidence in this case, but, rather, because he was a man of criminal character. See United States v. Bozza, 365 F.2d 206, 213 (2d Cir. 1966).
>
> * * * *
>
> It is apparent, from a reading of the trial transcript, that the defendant's counsel wanted to bring to the attention of the jury the fact that the defendant was an active member of the Broome & Allen Boys Associ-

ation, a charitable organization which conducts periodic fund raising activities in order to send young, underprivileged children to camp. He called seven persons, six of whom appear to be substantial businessmen, and one, a rabbi, who was a cousin of the late Supreme Court Justice Benjamin Cardozo, in order to elicit this information. Several of these witnesses were active members of the Broome & Allen Boys Association; one was its President and one was Co-Chairman of that Association's camp fund. Two of the witnesses were members of the same Masonic lodge as the defendant. One was a fellow member of the same Jewish temple, Temple Torah Israel. Rabbi Cardozo testified to the defendant's activity as a founder and active member of the Sephardic Center of Forest Hills, Long Island, New York. All seven of these witnesses were substantial citizens, and their testimony as to the defendant's reputation for honesty, etc., could have been very persuasive.

Each witness, on cross-examination, was asked whether he knew that the defendant had been arrested for grand larceny in 1945 (25 years before the date of the trial); whether he knew that the defendant had been convicted of auto theft in 1947 (23 years before the date of the trial); whether he knew that the defendant had been court-martialed and convicted in 1946 (24 years before the date of the trial) for what the prosecution called 'black market activities'; whether they knew of two pending indictments — one for posses-

sion of goods stolen while moving in interstate commerce and the other for smuggling jewelry.

After this cross-examination of the seven reputation witnesses, defendant's counsel decided to call the defendant to the stand in an apparent attempt to mitigate the adverse effect of the defendant's apparently horrendous criminal record.

Through the testimony of the defendant, he elicited the fact that, at age 17, the defendant and other youngsters took an automobile for a ride in 1945; that the defendant was arrested for grand larceny but the charge was dismissed. He also brought to the attention of the jury that, in 1947 at age 19, the defendant (while in Florida upon his discharge from the United States Army Air Force) borrowed a car from a friend, who represented himself to be the owner; drove it from Miami Beach to Miami; was charged and convicted for joy riding and paid a $55.00 fine. The alleged 'black market activities' in 1946 involved a common practice by military personnel to bring into a military reservation for persons stationed there, hard liquor, in violation of military regulations — more honored in the breach, as anyone who has served in the Armed Forces well knows. It was developed that this crime was committed by all the military personnel aboard an airplaine on its return flight from somewhere in the Pacific to the Air Force base in Okinawa, which the defendant described as a 'bleak island.' For

this horrendous crime, the defendant was reduced in rank from Corporal to Private, fined $50.00 and confined to the base for thirty days. But the confinement was countermanded after three days. As to the pending indictments, the defendant claimed his innocence and testified to exonerating facts and circumstances.

* * * *

Defendant argues that trial counsel's calling of the seven reputation witnesses and their subsequent impeachment and then calling the defendant, places this case out of the 'strategic' category, and by inference, into the realm of 'horribly inept,' thus requiring reversal. He argues that the jury, which otherwise would never have heard evidence of defendant's criminal history, heard it not once but seven times.

* * * *

Appellant claims that trial counsel was unaware that these reputation witnesses could be impeached with evidence of defendant's criminal history. Even if he were so unaware, he surely knew it after the first such witness had been cross-examined. The calling of six other reputation witnesses, who were similarly impeached, must be considered a strategic decision because it was made with knowledge of the consequences, and one made in a case where something

had to be done, but in which there was little that could be done. The calling of defendant to the stand to explain his prior record was clearly a strategic decision.

Whether these decisions were particularly wise or whether another trial lawyer would or would not have employed the same tactics is irrelevant. As this court has noted, '... the advisability of calling particular witnesses ...[is a] matter[s] open to honest differences of opinion — especially where, as here, the evidence to be elicited would not have directly rebutted the strong case against the appellant.' Garguilo, supra, 324 F.2d at 797. While the court may question the wisdom of calling reputation witnesses or the defendant in this case, the tactics so employed by defendant's trial counsel do not 'shock the conscience of the Court' and did not make the trial 'a farce and a mockery of justice.' Wight, supra."

Reasons for Granting the Writ

The requirement of effective assistance of counsel is a corollary of the Sixth Amendment right to counsel.

In recent years, since Gideon v. Wainwright, 372 U.S. 335 (1963), legal services has expanded by leaps and bounds in our criminal courts. Also, as the practice of criminal law has become "respectable," more and more attorneys are trying their hand defending criminal proceedings. While this Court has mandated the quantitative

increase in legal services at all levels (plea, trial, and appeal), the Court has not yet seen fit to address itself to the problem of the quality of such representation. As such the time is ripe for one good opinion to discuss the area of effectiveness — "minimum standards," as the ABA project advocates.

This case presents a good record for such a discussion. The issue was raised on direct appeal (after having been noted at the trial), and not on a collateral attack years later, after all other arguments were rejected. The trial attorney who called seven reputation witnesses never heard of Michelson. Defense counsel questioned his client about other pending indictments without advising him of his privilege against self-incrimination as to those charges. As such the attorney needlessly exposed his client's entire criminal life to the jury, without so advising the client of his rights, and without the attorney knowing what he was doing.

Also this record presents a good vehicle for the Court reassessing its decision in Michelson, 335 U.S. 469 (1948). The decision of the Court of Appeals notes that most of the events in the petitioner's life which were inquired in cross-examination of the reputation witnesses occurred more than twenty years prior to the trial when he was a very young man. The tone of the Court of Appeals' opinion is to attach little or no significance to events of such age at a time when the petitioner was a mere youth. If that be so, then perhaps the questions should not have been asked at all. Perhaps the jury was not as understanding

as the Court of Appeals as to the mistakes of the petitioner's youth. It may well be that as a mature adult, the petitioner did achieve a genuinely good reputation in the community for his philanthropy, his civic and community activities, and his business affairs.

As such it may be desirable for this Court to empower the District Court with discretionary and/or mandatory power to limit the questions that may be asked of reputation witnesses. Perhaps in events of twenty years ago, or doings of one before he reaches his age of majority, may be just too remote as to genuinely effect a good reputation built up over the years by a responsible adult.

As of now the district courts have no such discretion to screen events of years gone by. Discretion in our district judges would permit them wisely to assess, in any given situation, what is significant and what lacks probative value.

Conclusion

The petition should be granted.

Respectfully submitted,

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July 12, 1971

APPENDIX A

Decision

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 944—September Term, 1970.

(Argued May 14, 1971 Decided June 16, 1971.)

Docket No. 71-1067

UNITED STATES OF AMERICA,

Appellee,

—against—

JACK MATALON,

Appellant.

Before:

FRIENDLY, *Chief Judge,*
WATERMAN, *Senior Circuit Judge,* and
ZAVATT,* *Senior District Judge.*

Appeal from judgment of conviction, after trial to a jury in the United States District Court for the Southern District of New York, Mansfield, *Judge*, for violation of 18 U.S.C. §§2314, 2 and 371. Appellant was sentenced to concurrent terms of one year each on Counts 2 and 3. Affirmed.

* Of the Eastern District of New York, sitting by designation.

JEROME LEWIS and H. ELLIOT WALES, New York, N. Y., co-counsel *for Defendant-Appellant.*

WALTER S. ROWLAND, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York and Peter F. Rient, Assistant United States Attorney, of counsel), *for Appellee.*

ZAVATT, *District Judge*:

Appellant Matalon appeals from a judgment of conviction following a jury trial before Judge Mansfield in the Southern District of New York. The three count indictment charged appellant and three others (Rosenberg, Betesh and Daskal) with having induced one Norman Allan to travel in interstate commerce on March 14, 1963 (Count 1) and April 18, 1963 (Count 2), for the purpose of executing a scheme to defraud him, in violation of 18 U.S.C. §§2314 and 2 and with conspiring to violate the said statute (Count 3), 18 U.S.C. §371.

Rosenberg died prior to the trial. Daskal pleaded guilty to Count Three and testified for the Government. Betesh and appellant proceeded to trial, which commenced on December 4, 1970 and terminated on December 10, 1970. Betesh was found guilty on the first and third counts but was acquitted on the second; appellant was found guilty on the second and third counts but was acquitted on the first. On January 20, 1971, Judge Mansfield sentenced appellant to concurrent one-year terms of imprisonment on Counts Two and Three, which he has yet to serve, having been enlarged on bail pending the outcome of this appeal.

Appellant's only ground that concerns us on this appeal is his claim that he was denied the effective assistance of counsel at trial. This serious, but not uncommon allegation, is premised on trial counsel's calling of seven reputation witnesses, all of whom were impeached on cross-examination with evidence of defendant's prior criminal history. It is clear that the prosecution would have been unable to introduce this evidence if the reputation witnesses had not been called. See *Michelson* v. *United States*, 335 U.S. 469, 69 S. Ct. 213 (1948). In effect, the defendant claims that his conviction resulted from this blunder of defense counsel, compounded by his calling the defendant to the stand; that these errors enabled the jury to convict him, not on the evidence in this case, but, rather, because he was a man of criminal character. See *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966).

The appellant did not include in his appendix any of the evidence adduced by the Government on its direct case or any of the cross-examination of the Government's witnesses. The appellee submitted no appendix. Nevertheless, the court has studied the entire trial transcript.

Norman Allan, the victim and a Government witness, testified that he was in the business of importing, exporting and distributing merchandise in Detroit, Michigan. On March 8, 1963, he and Rosenberg met in Detroit and Rosenberg offered Allan 8,500 six-transistor radios for sale at $2.75 each. Allan accepted this offer and obtained a letter of credit for $23,375.00 from his bank in Detroit (7).* Thereafter, and on March 14, 1963, he traveled to New York City but did not talk business with Rosenberg until the next day, when Rosenberg informed him that only

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* Numbers in parentheses, except where otherwise indicated, refer to pages of the trial transcript.

6,300 radios would be available and that the cost would be $3.43 per unit (9). Following some bickering over the financial details and quantity of the purchase, Allan agreed to buy 6,300 six-transistor radios and 10,000 two-transistor radios for approximately $26,000.00, which he paid over to Rosenberg in the form of two cashier's checks and received from Rosenberg an invoice from Charles I. Betesh Company for the radios (18-20). Prior to returning to Detroit on March 18th, Allan made arrangements to have the radios shipped to Detroit. On March 17th, Allan returned to New York in connection with this transaction, accompanied by a lawyer, Arnold Gordon (27). They proceeded to the offices of Bayer, Pretzfelder & Mills (B, P & M) in New York City, where he met Rosenberg, Daskal and Matalon, the latter two for the first time (28). This company was owned by Daskal and Matalon. Allan returned to Detroit once again. Gordon remained in New York where he received the runaround because Rosenberg, according to Daskal, had other plans for the radios which he had previously sold to Allan. On March 14th, Brechner Bros. received an order from Charles I. Betesh and Company for 6,300 radios (202). The delivery papers, enabling the bearer to remove the radios from the Brechner warehouse, were turned over to the defendant Ralph Betesh (207). On March 18th, Rosenberg signed a bill of lading, purportedly in an agency capacity for Allan (208).

On March 19, 1963, while Allan was in Detroit awaiting the delivery of the radios which he had already paid for, Rosenberg, the apparent mastermind of the scheme, came to the offices of B, P & M where he met Daskal and Matalon. He requested Daskal to rent a Hertz truck, which he did. Because Daskal was unable to drive a stick-shift, Matalon drove the truck to the warehouse, accompanied by Daskal

and Rosenberg (237-239). En route, Rosenberg tried to sell the radios he was about to pick up, to Daskal, who initially agreed, but backed off when he ascertained from the bill of lading that they belonged to Allan. Although Matalon heard this conversation he, nevertheless, attempted to convince Daskal to buy the radios (241). After picking up the radios, Rosenberg sold them to others, and the next day, March 20, 1963, returned to Daskal's office and gave Daskal and Matalon $2,000.00 or $2,500.00, "since we helped him with radios" (243). Daskal and Matalon then divided their share of the proceeds of the illicit transaction.

There followed a series of phone calls and visits from Allan, who, understandably, was interested in obtaining his prepaid merchandise. Rosenberg had told Matalon and Daskal, who by now must have known what had transpired, that, since they had shared in the proceeds, they should help to keep Allan calm (245). On March 25, 1963, in response to a call from Allan, Matalon told him that he did not know where the radios were (30). On April 11, 1963 Matalon told him that a "gypsy truck" had picked up the radios in Chicago (where Rosenberg had told Allan they were) and was bringing them to a warehouse in New York (38). Finally, on April 18, 1963, while Allan was again in New York, Matalon allegedly spoke to a Mr. Harvey, who was supposed to be packing Allan's radios at a warehouse and requested him to "hurry up faster" (41). The radios were never delivered to Allan nor was his money ever returned.

In addition to this fraud, evidence was introduced to show that on March 17, 1963 Matalon defrauded the same Allan out of $30,000.00 for pearls which were never received (46-52). The details of this transaction were corroborated by Daskal (250-257).

The Government's case against the defendant Matalon was strong. There was ample evidence from which the jury could find that, as of March 20th (the date appellant received the proceeds of the fraud), Matalon had joined the conspiracy to defraud Allan (Count 3), and that his several efforts to stall Allan after that date were, in part, responsible for Allan's trip to New York on April 18, 1963 (Count 2). The Government's case consisted not only of the testimony of the victim but also the corroborative testimony of the co-conspirator Daskal, and all the relevant documents. Counsel for Matalon had cross-examined both Allan and Daskal extensively; and, obviously, thought this insufficient. This was a case in which "there [was] not too much the best defense attorney [could] do," *United States* v. *Katz*, 425 F.2d 928, 930 (2d Cir. 1970). Counsel apparently had no witnesses to call other than the defendant, who had a criminal record; so he chose to call reputation witnesses.

It is apparent, from a reading of the trial transcript, that the defendant's counsel wanted to bring to the attention of the jury the fact that the defendant was an active member of the Broome & Allen Boys Association, a charitable organization which conducts periodic fund raising activities in order to send young, underprivileged children to camp. He called seven persons, six of whom appear to be substantial businessmen, and one, a rabbi, who was a cousin of the late Supreme Court Justice Benjamin Cardozo, in order to elicit this information. Several of these witnesses were active members of the Broome & Allen Boys Association; one was its President and one was Co-Chairman of that Association's camp fund. Two of the witnesses were members of the same Masonic lodge as the defendant. One was a fellow member of the same Jewish temple, Temple Emanuah Israel. Rabbi Cardozo testified to the de-

fendant's activity as a founder and active member of the Sephardic Center of Forest Hills, Long Island, New York. All seven of these witnesses were substantial citizens and their testimony as to the defendant's reputation for honesty, etc., could have been very persuasive.

Each witness, on cross-examination, was asked whether he knew that the defendant had been arrested for grand larceny in 1945 (25 years before the date of the trial); whether he knew that the defendant had been convicted of auto theft in 1947 (23 years before the date of the trial); whether he knew that the defendant had been court-martialed and convicted in 1946 (24 years before the date of the trial) for what the prosecution called "black market activities"; whether they knew of two pending indictments —one for possession of goods stolen while moving in interstate commerce and the other for smuggling jewelry.

After this cross-examination of the seven reputation witnesses, defendant's counsel decided to call the defendant to the stand in an apparent attempt to mitigate the adverse effect of the defendant's apparently horrendous criminal record.

Through the testimony of the defendant, he elicited the fact that, at age 17, the defendant and other youngsters took an automobile for a ride in 1945; that the defendant was arrested for grand larceny but the charge was dismissed. He also brought to the attention of the jury that, in 1947 at age 19, the defendant (while in Florida upon his discharge from the United States Army Air Force) borrowed a car from a friend, who represented himself to be the owner; drove it from Miami Beach to Miami; was charged and convicted for joy riding and paid a $55.00 fine. The alleged "black market activities" in 1946 involved a common practice by military personnel to bring

into a military reservation for persons stationed there, hard liquor, in violation of military regulations—more honored in the breach, as anyone who has served in the Armed Forces well knows. It was developed that this crime was committed by all the military personnel aboard an airplane on its return flight from somewhere in the Pacific to the Air Force base in Okinawa, which the defendant described as a "bleak island." For this horrendous crime, the defendant was reduced in rank from Corporal to Private, fined $50.00 and confined to the base for thirty days. But the confinement was countermanded after three days. As to the pending indictments; the defendant claimed his innocence and testified to exonerating facts and circumstances. Every jury, including the jury in the instant case, is advised by the court that an indictment is merely an accusation; that it is no evidence whatsoever of a defendant's guilt and that no inference may be drawn from the fact that the defendant has been so indicted. It is arguable that the defendant's testimony tended to mitigate rather than exacerbate the effect of the cross-examination of the reputation witnesses.

Ineffective Assistance of Counsel

It has long been the law in this Circuit that the defendant must meet stringent standards in order to prevail on such a claim. "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950, 70 S. Ct. 478 (1950). This test has been adhered to in subsequent decisions of this court, *United States* v. *Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914, 89 S. Ct. 1761 (1969); *United*

States ex rel Maselli v. *Reincke*, 383 F.2d 129, 132 (2d Cir. 1967); *United States ex rel. Boucher* v. *Reincke*, 341 F.2d 977, 982 (2d Cir. 1965); *United States* v. *Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963). "If counsel's representation is so 'horribly inept' as to amount to a 'breach of his legal duty faithfully to represent his client's interests,' *Kennedy* v. *United States*, 259 F.2d 883, 886 (5th Cir. 1958), *cert. denied*, 359 U.S. 994, 79 S. Ct. 1126, 3 L. Ed. 982 (1959), there has been a lack of compliance with the fundamental fairness essential to due process." *Reincke*, *supra*, 383 F.2d at 132. "Errorless counsel is not required," *Garguilo*, *supra*, 324 F.2d at 796, and "tactical errors or mistakes in strategy," *Id.* at 797, even if established, will not suffice to meet the high burden placed on the defendant. See also *United States ex rel. Sabella* v. *Follette*, 316 F. Supp. 452 (S.D.N.Y. 1970); *United States ex rel. Pugach* v. *Mancusi*, 310 F. Supp. 691, 716 (S.D.N.Y. 1970), aff'd, slip op. 2479, —— F.2d —— (2d Cir. 1971).

Defendant argues that trial counsel's calling of the seven reputation witnesses and their subsequent impeachment and then calling the defendant, places this case out of the "strategic" category, and by inference, into the realm of "horribly inept," thus requiring reversal. He argues that the jury, which otherwise would never have heard evidence of defendant's criminal history, heard it not once but seven times. In considering the advisability of counsel's action, the court bears in mind the incisive dictum of Judge Friendly in his recent opinion of *Katz* v. *United States*, 425 F.2d 928 (2d Cir. 1970):

> Determination of the effectiveness of counsel cannot be divorced from the factual situation with which he is confronted. When, as here, the prosecution has an overwhelming case based on documents and the testi-

> mony of disinterested witnesses, there is not too much the best defense attorney can do. If he simply puts the prosecution to its proof and argues its burden to convince the jury beyond a reasonable doubt, the defendant may think him lacking in aggressiveness, and surely will if conviction occurs. If he decides to flail around and raise a considerable amount of dust, with the inevitable risk that some may settle on his client, the defendant will blame him if the tactic fails, although in the rare event of success the client will rank him with leaders of the bar who have used such methods in some celebrated trials of the past. 425 F.2d at 930.

Appellant claims that trial counsel was unaware that these reputation witnesses could be impeached with evidence of defendant's criminal history. Even if he were so unaware, he surely knew it after the first such witness had been cross-examined. The calling of six other reputation witnesses, who were similarly impeached, must be considered a strategic decision because it was made with knowledge of the consequences, and one made in a case where something *had* to be done, but in which there was little that could be done. The calling of defendant to the stand to explain his prior record was clearly a strategic decision.

Whether these decisions were particularly wise or whether another trial lawyer would or would not have employed the same tactics is irrelevant. As this court has noted, ". . . the advisability of calling particular witnesses . . . [is a] matter[s] open to honest differences of opinion—especially where, as here, the evidence to be elicited would not have directly rebutted the strong case against the appellant." *Gargulo, supra,* 324 F.2d at 797. While the court may question the wisdom of calling reputa-

tion witnesses or the defendant in this case, the tactics so employed by defendant's trial counsel do not "shock the conscience of the Court" and did not make the trial "a farce and a mockery of justice." *Wight, supra.*

In response to appellant's claim that, due to counsel's incompetence, he was convicted because he was a man of criminal character and not on the Government's evidence in the case, the court notes that, despite the egregious blunders claimed to have been committed by trial counsel in defense of his client, the appellant was acquitted on Count One of the indictment, cf. *Katz, supra,* 425 F.2d 931. This count concerned the inducing of Allan by the four defendants to come to New York on March 14th for the purpose of defrauding him. The evidence adduced at trial indicated that Matalon did not appear on the scene until March 17, 1963, when Allan met him for the first time. Thus, far from being dissuaded from considering the direct evidence, the jury obviously paid attention to it, as indicated by its acquittal of him on this count, a verdict in accord with the evidence.

The defendant's other claims on appeal (lack of a speedy trial and evidence of a contemporaneous similar act) are lacking in merit. The judgment of conviction entered below is affirmed.

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No. 71-71

In the Supreme Court of the United States

OCTOBER TERM, 1971

JACK MATALON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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JACK MATALON, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty of conspiracy and one substantive count of inducing one Norman Allen to travel in interstate commerce in furtherance of a scheme to defraud him, in violation of 18 U.S.C. 2314.[1] He was sentenced to concurrent one year prison terms. The court of appeals affirmed (Pet. App. A).

[1] Of the three others charged in the indictment, one, Rosenberg, died prior to trial. Daskal pleaded guilty to the conspiracy count and testified on behalf of the government. Betesh was tried with petitioner and found guilty on two counts. He was placed on probation for one year and did not appeal.

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1. The evidence, which petitioner does not contest, is recounted in some detail in the opinion of the court below (Pet. App. A 3a–8a). On March 8, 1963, Allen, an importer and distributor of merchandise in Detroit, met Robert Rosenberg and agreed to purchase for $23,375 a quantity of radios to be supplied by Ralph Betesh. A week later, Allen traveled to New York, where he conferred with Rosenberg and Betesh. After a series of meetings, they agreed to a new order and Allen paid Rosenberg approximately $26,000.

On March 19, 1963, Rosenberg arranged for Andor Daskal and petitioner to rent a truck and pick up the radios at a warehouse where they were being stored. In the truck en route, Rosenberg attempted to sell the radios to Daskal. Daskal refused after learning they belonged to Allen, despite petitioner's urgings that he do so. Rosenberg later sold the radios to others and gave Daskal and petitioner $2,000 or $2,500 for their help.

Rosenberg, faced with persistent inquiries from Allen, instructed petitioner and Daskal to help keep Allen calm. Shortly thereafter, petitioner told Allen that he knew nothing about the radios, and a week later assured him that the radios were being packed at the warehouse. Allen never received the shipment, nor was his money returned.

At trial, the government presented testimony from Allen and Daskal, as well as all relevant documents. Petitioner's counsel did not present any direct evidence, but instead called seven character witnesses, consisting of six members of the business community and a rabbi. Each testified that petitioner enjoyed an

excellent reputation and was actively engaged in charitable activity (*e.g.*, 34A, 38A),[2] but on cross-examination admitted that he did not know of several prior convictions, a court-martial, and two indictments then pending against petitioner for smuggling and possession of stolen goods (*e.g.*, 34A–36A). Petitioner took the stand to explain the facts surrounding each charge against him. His attorney questioned him about the pending indictments, but was stopped by the trial judge, who asked if petitioner had been advised of his constitutional rights. After counsel and petitioner assured the judge that petitioner was aware of his rights, the judge allowed the inquiry to proceed (70A–81A).

2. Petitioner's only contention in this Court is that he was denied effective assistance of counsel. He bases this claim on asserted mistakes by his retained counsel in calling the reputation witnesses, despite the rule of *Michelson* v. *United States*, 335 U.S. 469, permitting cross-examination of such witnesses on their knowledge of a defendant's criminal record, and in questioning petitioner about the pending indictments without informing him of his right against self-incrimination. The first criticism was thoroughly discussed and rejected in the opinion of the court below, on which we rely here (Pet. App. A 8a–11a). With regard to his second claim, we note that petitioner testified at trial that he had been fully advised by counsel of his rights (70A), and recanted that testimony only when the attorney representing him in one of the pending cases

[2] "A" refers to Appellant's Appendix in the court of appeals, a copy of which we are lodging with the clerk.

complained of petitioner's remarks (93A–95A). Moreover, the court below found it "arguable" that petitioner's testimony "tended to mitigate rather than exacerbate the effect of the cross-examination of the reputation witnesses" (Pet. App. A 8a), so that counsel's decision on this score probably helped petitioner.

Petitioner's counsel was faced with strong evidence of guilt, supplied largely through the testimony of petitioner's co-conspirator (Daskal) and the victim of the fraud. In these circumstances, he cannot be faulted for trying, albeit unsuccessfully, to depict his client as a respected member of the community and to overcome the effects of the resulting cross-examination by having petitioner explain, in exonerative terms, his criminal record. The court below correctly concluded on this record that petitioner received adequate representation. Compare *United States* v. *Katz*, 425 F. 2d 928 (C.A. 2), with *United States* v. *Hammonds*, 425 F. 2d 597 (C.A. D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERVIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

Petitioner suggests (Pet. 15) that district courts should have discretion to prohibit questioning character witnesses about remote or insignificant arrests or convictions. District courts already possess that power. *Michelson* v. *United States*, 335 U.S. 469, 484. In this case, since the character witnesses testified that they had known petitioner a long while, the trial judge manifestly did not abuse his discretion by permitting the prosecutor to inquire into their knowledge of criminal charges against petitioner remote in time but relevant to how well they knew him.

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